



# DHS ENFORCEMENT PRIORITIES UPDATE

SEPTEMBER 2021

The ***DHS Enforcement Priorities*** remain in effect in most situations. Although lawsuits and court decisions have caused some confusion, as of September 15, 2021, all DHS components should be following the Biden enforcement priorities, with a few exceptions that we explain below.

## BACKGROUND:

In the beginning of the Biden administration, DHS issued new immigration enforcement priorities. These were explained in the DHS' January 20th "[Pekoske Memo](#)" and ICE's February 18th "[Johnson Memo](#)." Together, these memos created [three general categories of people](#) to be prioritized for enforcement-related actions if they were deemed to be either a 1) national security, 2) border security, or 3) public safety threat. That means that people outside these priority categories should not be targeted for enforcement, but should get prosecutorial discretion. For example, these categories would guide ICE's decisions on whether to issue detainers, make immigration arrests, initiate removal proceedings, detain or release someone, or execute removal orders. For more explanation of these policies, see: <https://www.ilrc.org/glance-feb-18th-interim-ice-johnson-memo>.

Several states filed lawsuits challenging the legality of these policies. The lawsuits led by Arizona and Florida have failed so far (though Arizona and Florida have appealed the decisions and they remain pending). In a third lawsuit brought by Texas and Louisiana, a federal court issued a nationwide preliminary injunction on August 19, preventing DHS from applying the enforcement priorities guidance.

## CURRENT LEGAL STATUS:

On September 15, the Fifth Circuit in [Texas v. United States](#) issued a partial stay of the August 19 nationwide preliminary injunction. This means that the Pekoske and Johnson memos are back in effect as governing policy, except for in two situations.

The two exceptions: 1) people subject to ICE detainers who also fall under the rules for [mandatory detention](#), and 2) with people who were ordered removed within the last 90 days. The Fifth Circuit blocked DHS from releasing these people from custody.

However, even if someone does fall within these exceptions, the Fifth Circuit was clear that its decision does not mandate ICE to arrest or deport anyone. That means that even though ICE can't rely on the enforcement priorities policies to justify it, ICE still retains the ability to decide not take enforcement actions in any given case. This is especially true if advocates can show strong equities, like community ties, rehabilitation, or other strong factors in individual cases.

## WHAT RULES APPLY NOW?

All DHS officials should still be following the enforcement priorities and should be avoiding enforcement actions and/or granting prosecutorial discretion according to the Pekoske and Johnson memos, unless the

person falls under the exceptions identified above.

In May, ICE's Office of the Principal Legal Advisor (the head of ICE attorneys) issued a [memo](#) on how ICE attorneys should exercise prosecutorial discretion under the Pekoske and Johnson memos in the context of removal proceedings. ICE attorneys in removal proceedings should continue to follow this [OPLA directive](#)

Additionally, on August 11, ICE issued [new policy guidance about prosecutorial discretion for people who are victims of crimes](#). Because this policy was not based on the Pekoske and Johnson memos enjoined by the court, this policy is unaffected by the litigation.

## WHAT ABOUT SANCTUARY POLICIES?

This litigation is about what DHS is allowed or required to do; it does not affect existing sanctuary laws. Even if a person is an enforcement priority or must be detained according to the court's decision, that does not mean that local law enforcement has an obligation to assist ICE or transfer someone to ICE. Local law enforcement must continue to follow state and local laws.

**TAKEAWAY:** *As of September 15, the injunction is partially stayed (suspended) and the Enforcement Priorities are still in effect. Advocates and practitioners can and should continue pursuing prosecutorial discretion and challenging ICE decisions via the [ICE case review process](#) or in immigration court and via advocacy with local ICE field offices based on the Pekoske, Johnson, and OPLA memos.*



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